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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

MINNIE ANN PERRY, as Trustee, etc.,

Plaintiff and Respondent,  
v.

RICHARD T. PERRY, JR., et al.,

Defendants and Appellants.

2d Civil No. B210902  
(Super. Ct. No. 1302030)  
(Santa Barbara County)

Appellants challenge an order of the probate court granting respondent's safe harbor application under Probate Code section 21320.<sup>1</sup> The court determined that respondent's proposed petition to determine her community property interest in certain assets of the estate of her deceased husband would not violate the no contest clauses contained in the decedent's will and trusts. We affirm.

*FACTUAL AND PROCEDURAL HISTORY*

Richard T. Perry (Richard) married respondent Minnie Ann Schonka (Minnie) in 1979.<sup>2</sup> Appellants Richard T. Perry, Jr., Bruce M. Perry, Mark B. Perry, and Kathryn Mowrer (the children) are Perry's children by a prior marriage.

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<sup>1</sup> All statutory references are to the Probate Code.

<sup>2</sup> We refer to the Perrys by their first names for clarity and mean no disrespect.

A. *The Ante-Nuptial Agreement*

Prior to their marriage in 1979, Minnie and Richard executed an ante nuptial agreement. The agreement states that the parties "intend and desire to define their respective rights in the property of the other, and to avoid such interests which, except for the operation of this agreement, they might acquire in the property as incident to their marriage relationship." The parties agreed that "each shall retain absolute ownership of such properties, monies, and credits of whatsoever kind and wheresoever located together with all rents and profits thereof and increases thereon as his or her separate property, and at no time shall either party have or claim any interest in any properties, monies, or credits of the other, whether or not any rents, or profits thereof, or increases thereon are a direct result of the personal efforts, skills, or services of the party owning them or of the other party."

The agreement also states: "Each party agrees with the other that any earnings, salaries, commissions, or income resulting from his or her personal services, skills, and efforts during the marriage while residing in the State of California shall be the community property of the parties" and "each party waives, discharges, and releases any and all claims and rights, actual, inchoate, or contingent, in law and equity which he or she may acquire by reason of such marriage in separate property of the other or in the other's half of any community property which the parties may acquire . . . ."

Attached to the agreement are handwritten lists of Minnie's and Richard's separate property. Richard's separate property consisted of assets valued at more than \$15 million including a 2,376-acre ranch, two motels on State Street in Santa Barbara, interests in numerous oil and gas wells, a residence in Hope Ranch, two condominiums, life insurance, and numerous securities. One of the securities listed was 7,000 shares of Wrigley stock.

*B. The Trusts*

On June 24, 1996, Richard created two living trusts, the first naming the children as beneficiaries (Trust No. 1) and the second naming Minnie as beneficiary (Trust No. 2). The trusts contain substantially similar no-contest clauses. The clause in Trust No. 1 states in part: "Any beneficiary under this Trust Agreement or the Richard T. Perry Living Trust No. 2 or under any amendment to either such trust, under the Settlor's will, or under any codicil to the Settlor's will, . . . who, directly or indirectly, objects to the probate of the Settlor's will or codicil or, in any manner, contests or aids in contesting the validity of the Settlor's will and codicils, this Trust Agreement or the Richard T. Perry Living Trust No. 2, or any amendment to either such trust or of any of the provisions of any of the foregoing, or commences or prosecutes any legal proceedings of any kind in any court to set aside the Settlor's will, any codicil to the Settlor's will, this Trust Agreement or the Richard T. Perry Living Trust No. 2, or any amendment to either such trust, whether or not such beneficiary . . . has probably [*sic*] cause, shall by such opposition or contest forfeit any right or interest whatsoever under the Settlor's will, any codicil to the will, this Trust Agreement, the Richard T. Perry Living Trust No. 2, any amendment to either such trust, and in any portion of the Settlor's estate. In the event of such forfeiture, the Settlor hereby directs that the property and estate be disposed of pursuant to this Trust Agreement, provided, however, that in making such disposition, each such forfeiting beneficiary . . . shall be treated in all respects as if he or she had predeceased the Settlor leaving no issue surviving the Settlor."

Both trusts contain the following language: "The Settlor hereby transfers to the Trustee the property listed on the annexed Schedule A, all of which is the Settlor's separate property and receipt of which the Trustee acknowledges. The Trustee will hold this property, as well as any additional property subsequently transferred to the Trustee, in trust according to the provisions of this

Trust Agreement (including the administrative provisions set forth in Schedule B to this Trust Agreement)."

Schedule A to Trust No. 2 lists the following property: "(1) Hope Ranch house and adjacent acreage, Santa Barbara, California [and] [¶] (b) Wrigley stock: [¶] Share Certificate[s] #WB0008142[,] 56,200 [shares] [¶] #WC36998[,] 40,900 [shares] [¶] Total Shares 97,100."

Schedule A to Trust No. 1 is blank. Schedules C through G to Trust No. 1 make specific devises to each of the five children. Richard Jr. receives "43 undeveloped acres in Mattawa, Washington;" Bruce receives "Residence located in Mattawa, Washington" and "12.7 acres across from Minimart in Mattawa, Washington;" Scott receives "Orange Tree Inn, 1920 State Street, Santa Barbara, California" and "Lemon Tree Inn, 2819 State Street, Santa Barbara, California;" Mark receives "960 acres (6 farms) located in the State of Washington, including equipment, storage buildings and all improvements;" and Kathryn receives "Canadian oil and gas royalty interests" and "Canadian Horizontal wells."

Trust No. 1 also states: "The balance of the trust property shall be distributed to the Settlor's children, . . . in equal shares, subject to adjustment as set forth below."

*C. The Will and Codicil*

On the same day the trusts were created, Richard executed a pour-over will leaving the residue of his estate to the children. The will contains a no-contest clause substantially similar to those in the trusts. The will does not list specific property nor characterize any property as separate property. The will states: "I give the residue of the property owned by me at my death, real and personal and wherever located (my 'residuary estate'), to the then acting Trustee under the Richard T. Perry Living Trust Agreement No. 1 . . . to become part of and in all respects follow the disposition made in that trust of my property at my death."

On June 10, 1998, Richard executed a codicil containing the following revisions to the will, as follows: "If my wife, MINNIE ANN PERRY, survives me by thirty (30) days, I give (i) all my interest in Hope Ranch house and adjacent acreage, located in Santa Barbara, California, and (ii) my share certificates #WB0008142 and #WC36998 of Wrigley stock to the then acting Trustee under the Richard T. Perry Living Trust Agreement No. 2 . . . to become part of and in all respects follow the disposition made in that trust of my property at my death. If such Living Trust Agreement has been revoked prior to my death, or if for any other reason this gift shall fail to take effect, then I give such property to MINNIE ANN PERRY, as Trustee, or her successor, as specified in such Living Trust Agreement, to hold, administer, and distribute on the same terms and conditions and with the same powers as are provided in that Living Trust Agreement as it reads on the date of execution of this Will, the terms of which are incorporated in this Will by this reference. If my wife predeceases me, or survives me but dies within thirty (30) days of my death, the gifts under this Paragraph (C) shall lapse and shall be disposed of as a part of my residuary estate."

*D. The Powers of Attorney*

In 2002, due to failing health, Richard executed several powers of attorney naming Scott and Mark as his agents. One of them was a durable power of attorney. It was executed on October 31, 2002, and gives Scott the following power: "1.(e) To create, amend, supplement and terminate any trust and to instruct and advise the trustee of any trust wherein I am or may be trustor or beneficiary; . . . [¶] (j) To fund the Richard T. Perry Living Trust Agreement #1 dated June 24, 1996, or any other trust which is revocable by me (or by the Attorney acting hereunder from time to time) during my lifetime. [¶] (k) To designate or change the designation of beneficiaries to receive any property, benefit, or contract right on behalf of me, but only if such change results in such property, benefit or contract right passing to the Richard T. Perry Living Trust Agreement #1 dated

June 24, 1996, or any other trust which is revocable by me (or by the Attorney acting hereunder from time to time) during my lifetime."

*E. Minnie's Proposed Petition*

Richard died on September 5, 2007. On August 6, 2008, Minnie filed an application seeking a determination that a petition she proposed to file would not violate the no contest clauses in the trusts and will. The proposed petition requests an order (1) determining her community interest in property, (2) directing transfer of title to and/or possession of property, (3) awarding double recovery for bad faith taking of property, (4) allowing discovery, and (5) compelling an accounting.

The proposed petition alleges that Scott or Mark used the powers of attorney to gain control of all the decedent's assets, including assets in which Minnie has an interest, and transferred them to Trust No. 1, ignoring Minnie's community property interest in those assets. The petition also alleges that Scott withdrew \$463,950 from an annuity Richard had established for Minnie outside the estate plan and deposited the money into Trust No. 1. In addition, the petition alleges that the children have refused to deliver to Minnie the assets in Trust No. 2, including the 242,750 shares of Wrigley stock.

The petition seeks the following relief: (1) A determination that Minnie is entitled to 242,750 shares of Wrigley stock or the proceeds from any sales of the stock, (2) a determination that Minnie is entitled to the return of \$463,950 the children withdrew from the annuity, (3) a determination that Minnie owns a community property interest in a portion of Richard's remaining assets, (4) monetary penalties for bad faith pursuant to section 859, (5) an accounting, and (6) discovery into Richard's financial and business affairs so she may determine the extent of her community property interest.

The probate court found that the petition did not constitute a contest in violation of the no contest clauses of the trusts and will. The children assert that

the petition violates the no contest clauses because it seeks to determine Minnie's community property interest in Richard's separate property.

## *DISCUSSION*

### *Standard of Review*

"In reviewing the trial court's order that a beneficiary's proposed action will not violate a no contest clause, we apply the de novo standard of review." (*Giammarrusco v. Simon* (2009) 171 Cal.App.4th 1586, 1600.) A court is required to strictly construe a no contest clause and may not extend it beyond what was plainly the testator's intent. (§ 21304; *Burch v. George* (1994) 7 Cal.4th 246, 254.) ""Only where an act comes strictly within the *express* terms of the forfeiture clause may a breach thereof be declared."" (*Betts v. City Nat. Bank* (2007) 156 Cal.App.4th 222, 232.)

### *No Contest Clauses*

"Under section 21320, 'a beneficiary may, without violating a no contest clause, apply to the court for a determination whether a particular act would be a contest provided that no determination of the merits of the petition is required.' . . . "[S]ection 21320 provides . . . a 'safe harbor' for beneficiaries who seek an advance judicial determination of whether a proposed legal challenge would be a contest . . . " . . . If a court determines that a . . . proposed action would constitute a contest, the beneficiary will then be able to make an informed decision whether to pursue the contest and forfeit his or her rights under a will *or* to forgo that contest and accede to the will's provisions." (*Betts v. City Nat. Bank, supra*, 156 Cal.App.4th at p. 232, fn. omitted.)

A no contest clause requires a beneficiary to acquiesce to the terms of a trust or will as a condition to receiving its benefits, and disinherits any beneficiary who challenges the instrument. (*Burch v. George, supra*, 7 Cal.4th at pp. 254-255, 265; *In re Hite's Estate* (1909) 155 Cal. 436, 440-441.) A contest is defined as "any action identified in a 'no contest clause' as a violation of the clause," and includes "a pleading in a proceeding in any court alleging the

invalidity of an instrument or one or more of its terms" on various grounds including "[l]ack of capacity." (§ 21300, subs. (a), (b)(2).) The circumstances of each case and the particular language used in the no contest clause determines whether there has been a contest. (*Burch*, at pp. 254-255.)

"Factors relevant to determining whether a claim involving the characterization, inclusion or distribution of a certain item of property in a testamentary instrument is a contest include the particular language of the no contest clause; whether the testamentary instrument specifically enumerates the property and its distribution; whether the testamentary instrument specifically characterizes the property (e.g., as separate versus community property); and whether the challenge, if successful, would result in thwarting the testator's intent." (*Nairne v. Jessop-Humble* (2002) 101 Cal.App.4th 1124, 1128.)

*Minnie's Request for a Determination of Her Community Property Interest in the Estate Does not Violate the No Contest Clauses of the Trusts and Will*

The children argue the petition violates the no contest clauses because Minnie is seeking to recharacterize Richard's separate property as community property. In *Burch v. George*, *supra*, 7 Cal.4th 246, the court held that where a trustor has expressed the intent to dispose of specific property, indicating that he is disposing of all of it, an election by the beneficiary claiming an independent right to that property under community property laws is required. It does not matter that the decedent might be mistaken about the character of the property. The specification of the particular property along with directions to dispose of all of it under the will or trust evidences the decedent's intent to put the beneficiary to an election. (*Id.* at pp. 257-258.)

The court quoted Witkin with approval: "If the testator refers to the property bequeathed or devised in general terms without identifying it as separate or community, it may be inferred that he intended only to dispose of his own interest (his separate property and one-half the community property), and no

election is necessary, no matter how liberal the provision is for the wife. [Citation.]" (12 Witkin, Summary of Cal. Law (9th ed. 1990) Wills and Probate, § 55, pp. 93-94.) On the other hand, "if the testator declares that all the property is his separate property, thus clearly indicating a belief that he is disposing of the entire estate, election is required. [Citations.] "It is of no concern that he was mistaken in his belief that the wife had no community interest in the property devised. His manifest intention to devise the estate as an entirety, and irrespective of any right which might be asserted on behalf of the marital community, is the controlling factor." [Citation.]" (12 Witkin, *supra*, § 55, p. 94.)" (*Burch v. George*, *supra*, 7 Cal.4th at p. 257.)

Under these principles, if Minnie attempts to claim a community property interest in assets characterized in the ante nuptial agreement and Trust No. 1 as Richard's separate property, the no contest clause would be triggered. However, we do not read the petition to claim a community property interest in those assets. Rather Minnie is claiming she has a community property interest in assets that were transferred to Trust No. 1 under the power of attorney and any other assets that have not yet been identified.

The children argue that Richard intended all his property to be his separate property. They point to language in Trust No. 1 referring to the property transferred to the trust in Schedule A: "The Settlor hereby transfers to the Trustee the property listed on the annexed Schedule A, all of which is the Settlor's separate property . . . . The Trustee will hold this property, as well as any additional property subsequently transferred to the Trustee, in trust according to the provisions of this Trust Agreement . . . ." The children argue that Perry's designation of the property transferred to the trust in Schedule A as his separate property necessarily extends to "any additional property subsequently transferred to the Trust" at any time by whatever means. The problem with this interpretation is that no assets were transferred to Schedule A of Trust No. 1.

The children also rely on language in the power of attorney authorizing the attorney in fact "1.(e) To create, amend, supplement and terminate any trust and to instruct and advise the trustee of any trust wherein I am or may be trustor or beneficiary; . . . [¶] (j) To fund the Richard T. Perry Living Trust Agreement #1 dated June 24, 1996, or any other trust which is revocable by me (or by the Attorney acting hereunder from time to time) during my lifetime. [¶] (k) To designate or change the designation of beneficiaries to receive any property, benefit, or contract right on behalf of me, but only if such change results in such property, benefit or contract right passing to the Richard T. Perry Living Trust Agreement #1 dated June 24, 1996, or any other trust which is revocable by me (or by the Attorney acting hereunder from time to time) during my lifetime." Contrary to the assertion made by the children, there is nothing in this provision indicating Richard's intent that such assets are his separate property.

Richard did not designate assets other than those specifically identified in the ante nuptial agreement and Trust No. 1 as his separate property. The ante nuptial agreement contains language indicating that Richard recognized that Minnie would acquire a community property interest in "any earnings, salaries, commissions, or income resulting from his or her personal services, skills, and efforts during the marriage while residing in the State of California." Richard's will in which he transfers the residuary of his estate contains no language indicating that property devised through the will is Richard's separate property. The will states that "I give the residue of the property owned by me at my death, real and personal and wherever located (my 'residuary estate') . . . ." This language is similar to that in cases where the courts have held that there was no indication that the decedent was devising only his separate property.

For example, in *Estate of Richter* (1993) 12 Cal.App.4th 1361, a husband executed a will containing a residuary clause which left 20 percent of the residue of his estate to his wife. The will contained a no contest clause. After the husband's death, his wife filed an application for a determination whether filing a

petition to determine her community property interest in the assets acquired during the marriage would violate the no contest clause. The court held the proposed petition did not violate the no contest clause, reasoning: "In the instant case, the decedent simply stated in his will: 'I give the residue of my estate as follows . . . .' By referring to 'my estate' in general terms, he would appear to be referring to that property owned by him which he had a right to dispose of by will. He did not specify any particular property which constituted his estate; he did not identify it as his separate property. Appellant did not seek to challenge his inclusion of any particular property in his estate . . . ; rather, she sought a determination as to what property was part of his estate and what property was hers and not subject to his disposition by will, as in *Estate of Black* [(1984) 160 Cal.App.3d 582]. This leads to the conclusion the proposed petition by appellant would not be a will contest . . . ." (*Estate of Richter, supra*, 12 Cal.App.4th at p. 1369.)

In *Estate of Black, supra*, 160 Cal.App.3d 582, the will described the testator's estate in general terms and contained a statement that he intended to dispose of the property "which I have the right to dispose of by will." The court held a petition by the decedent's cohabitant to establish *Marvin*<sup>3</sup> rights in the testator's property did not violate the will's no contest clause which prohibited beneficiaries from "directly or indirectly, contest[ing] or attack[ing] this will or any of its provisions" because the language of the will indicated the testator did not intend to dispose of property in which his cohabitant had a *Marvin* interest. (*Id.* at p. 592.)

Similarly, in *Jacobs-Zorne v. Superior Court* (1996) 46 Cal.App.4th 1064, a petition seeking to determine an interest in joint tenancy bank accounts was held not to be a contest because the decedent did not purport to characterize and dispose of specific property. The testator stated, "It is my intention by this Will to dispose of my separate property . . . ." (*Id.* at p. 1068.) The court

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<sup>3</sup> *Marvin v. Marvin* (1976) 18 Cal.3d 660.

construed this language as indicating the testator's intent of disposing of that which was his. Thus, the widow's right to the accounts was not subject to the will.

To the extent the petition seeks to determine Minnie's interest in property not characterized as Richard's separate property in the ante nuptial agreement and Trust No. 1, the petition does not constitute a contest.<sup>4</sup>

The children do not contend that any other portion of the petition constitutes a contest. We note that an accounting is excluded from the definition of a contest under section 21305, subdivision (b)(12). The request for discovery is not a contest because it relates to establishment of her community property interests in those properties in the estate not characterized as Richard's separate property. The request seeking return of the annuity is not a contest because the annuity is not part of the trust estate. The request seeking return of the Wrigley stock is not a contest because Richard devised the stock to Minnie and, upon his death, it became her separate property.

The order is affirmed. Respondent shall recover costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

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<sup>4</sup> As we have determined that the petition does not constitute a contest under relevant judicial authorities, we need not address whether section 21305, subdivisions (a)(2), (a)(3), (b)(3), (b)(6) provide statutory safe harbors.

J. William McLafferty, Judge  
Superior Court County of Santa Barbara

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Rogers, Sheffield & Campbell, LLP, Scott B. Campbell, Fred S.  
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